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No. 89-609 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1990

DONALD PUCKETT, ET AL., PETITIONERS

v.

NATIVE VILLAGE OF TYONEK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether respondent Native Village of Tyonek, an Alaska Native Village exercising self-governing powers under a constitution adopted pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. 476, is immune from the counterclaims in this civil action under the doctrine of tribal sovereign immunity.

2. Whether the Village's immunity from suit was abrogated by Congress when it enacted the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*, or the Indian Civil Rights Act, 25 U.S.C. 1301 *et seq.*

3. Whether the Village waived its immunity to the counterclaims, either by a "sue or be sued" clause in the corporate charter it was issued under Section 17 of the Indian Reorganization Act, 25 U.S.C. 477, or by filing its complaint in this civil action.

4. Whether derivative immunity bars petitioners' third-party claims against the officers of the Village in connection with their enforcement of a Village ordinance providing that, without the consent of the Village Council, housing built with tribal trust funds may not be leased or alienated to persons who are not members of the Village.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. The Village of Tyonek, on the northwest shore of Cook Inlet, has been inhabited by Tanana Indians since as early as the eighteenth century, when the first white settlers arrived in Alaska. Pet. App. 8, 10. In 1915, President Wilson issued an executive order withdrawing 25,000 acres surrounding the Village, which became known as the Moquawkie Reservation. Executive Order No. 2141 (Feb. 27, 1915); Pet. App. 8, 10. The area was set aside for the purpose of "aiding the natives to practice self-support and industry" and preventing them from being "hemmed in by white intrusion." Letter from Comm'r of Educ. Tallman to Sec'y of the Interior (Feb. 23, 1915) reprinted in *Oil and Gas Leasing*

on Lands Withdrawn by Executive Order for Indian Purposes in Alaska, 70 Interior Dec. 166, 175-176 (1963).

In 1939, the Natives living in the Village adopted a constitution and bylaws under Section 16 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 476, and a corporate charter under Section 17 of the Act, 25 U.S.C. 477. Both were approved by the Secretary of the Interior. Pet. App. 11. Section 16(e) of the IRA provides that the constitution adopted by an Indian tribe shall vest in the tribe or its council the power, *inter alia*, "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." The constitution of the Native Village of Tyonek lists among its powers the rights to "deal with the Federal and Territorial Governments," "stop any giving or taking away of Village lands or other property without its consent," "control the use by members and nonmembers of any reserve set aside by the Federal Government for the Village and to keep order in the reserve," and "guard and * * * foster native life, arts and possessions and native customs not against law." Tyonek Const. Arts. I, IV (Supp. C.R. 46, Exh. B, at 1, 2).[1]

In the mid-1960s, the Secretary of the Interior, with the consent of the Village Council as required by 25 U.S.C. 398 and 398a, granted oil and gas leases covering a portion of the Reservation. Pet. App. 12; *Fondahn* v. *Native Village of Tyonek*, 450 F.2d 520, 521 (9th Cir. 1971). Under 25 U.S.C. 398b, the proceeds of such leases on an Executive Order Indian Reservation must be deposited in the Treasury to the credit of the "tribe of Indians" for whose benefit the reservation was established and must thereafter be available for the "use and benefit of such Indians." In this case, a portion of the lease proceeds was used to build 60 houses in the Village to help solve a housing shortage. The Tyonek Council established a "Family Plan" for this purpose, under which families comprised of Village members could obtain the construction and furnishing of a house at the Village's

[1] "Supp. C.R." refers to Appellants' Supplement to the Excerpts of the Clerk's Record in the court of appeals.

expense. Pet. App. 12. While the houses were being constructed, the Council passed Village Ordinance No. 65-32, which provides in pertinent part (*ibid.* (emphasis omitted)):

> [T]he interests of members of the Village in houses which are acquired by such members by virtue of the Family Plan of the Village cannot be sold, conveyed, leased, mortgaged, or otherwise alienated by any member of the Village to a person, corporation, or other legal entity which or who is not a[n] enrolled member of the Village of Tyonek, Alaska.

2. The Moquawkie Reservation, along with all other reservations in Alaska save one, was revoked by Section 19(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1618(a). The surface estate in former Reservation land was conveyed to the for-profit Tyonek Native Corporation, pursuant to Section 14(a) of ANCSA, while the subsurface estate was conveyed to the Cook Inlet Regional Corporation, pursuant to Section 14(f). 43 U.S.C. 1613(a) and (e), 43 U.S.C. 1606(a); Pet. App. 14. ANCSA did not purport to affect the Village's governing powers, its ordinances, or other measures, such as the Family Plan. Pet. App. 14.

3. Petitioners are nonmembers of the Village who desired to rent Family Plan units from Village members. The Pucketts, who had been living at a nearby timber camp, requested and were granted permission by the Village Council to lease one unit from October 1981 through May 1982, in order to enable their children to complete the school year at the Village school. The Village President, Donald Standifer, informed the Pucketts in April and June 1982 that their authorization to lease the unit expired at the end of the school year, but the Pucketts refused to vacate the premises and signed a lease for another year. The Slawsons requested permission to reside in another Family Plan unit, but their request was denied by the Council. The Slawsons nevertheless signed a lease and moved into the unit. Pet. App. 15-16.

4. The Village of Tyonek initiated this action in 1982 to evict the Pucketts and the Slawsons from the Family Plan units and to enjoin the lessors, who are members of the Village, from leasing their units to nonmembers. The Village sought to enforce both

Ordinance No. 65-32 and Village Rule No. 4. The latter provision was adopted by the Village Council in 1942 and prohibits any "white men" (other than government employees) from remaining in the Village more than twenty-four hours and from bringing liquor into the Village. Pet. App. 11, 16. Although Rule No. 4 uses the term "white men," the Village introduced an affidavit of Village President Standifer that described Rule No. 4 as applying to "nonmembers of the Tribe" (Supp. C.R. 50, Exh. A, at 23-24), and the district court and court of appeals both apparently understood the Rule to apply to "nonmembers." Pet. App. 4, 9, 11, 23 n.11; cf. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 666-669 & n.16 (1979) (discussing 25 U.S.C. 194, which imposes burden of proof on "white person" in property dispute with Indians); 442 U.S. at 679-681 (Blackmun, J., concurring).

Petitioners counterclaimed against the Village and filed third-party claims against four Village officers (the president, vice president, secretary-treasurer and Village administrator), seeking declaratory and injunctive relief as well as compensatory and punitive damages. Petitioners alleged that the enforcement of Ordinance No. 65-32's restriction on leases to nonmembers constituted unlawful discrimination on the basis of race, in violation of the Fourteenth Amendment and various civil rights statutes: 42 U.S.C. 1981, 1982, 1983 and 1985; the Fair Housing Act of 1968, 42 U.S.C. 3604 and 3617; the Indian Civil Rights Act, 25 U.S.C. 1302(a); and state housing discrimination laws. Pet. App. 23-24 n.12.

In an unpublished bench opinion, the district court dismissed all of the parties' claims. Pet. App. 7-36. In doing so, the court addressed the validity of Ordinance No. 65-32, *id.* at 32-35 (see page 7, *infra*), but it stated that petitioners' counterclaims and third-party claims were not based upon alleged attempts by the Village or its officers to enforce Rule No. 4 and that it therefore was not deciding the validity of that provision. *Id.* at 23 n.11.

The district court dismissed the Village's complaint for lack of subject matter jurisdiction, because, in the court's view, the Village's suit to enforce its own laws (Ordinance No. 65-32 and Rule No. 4) did not "arise under" federal law for purposes

of 28 U.S.C. 1331 or 1362. Pet. App. 17-22. The district court dismissed petitioners' counterclaims on the ground that the Village is immune from suit by virtue of tribal sovereign immunity. *Id.* at 23-32. And it dismissed the third-party claims against the Village officers on the ground that they were barred by derivative immunity because the officers' enforcement of Ordinance No. 65-32 was within the scope of their official authority. *Id.* at 32-35. On this issue, the court reasoned that whether the Village officers possess derivative immunity depends on whether the Village itself had the governmental authority to adopt Ordinance No. 65-32 to exclude nonmembers from Family Plan housing. The court concluded that it did. It pointed out that "by the express terms of [25 U.S.C.] 398b, the funds obtained from Tyonek's oil and gas leases were held in trust for members of the Village alone." Pet. App. 35. The court found it "completely logical, therefore, for Tyonek to use those funds in 1965 to build housing for Village members only, and to attempt to restrict the extent to which these houses would benefit or be used by non-members of Tyonek." *Ibid.*

5. In a brief opinion, the court of appeals reversed the dismissal of the Village's complaint, finding that its suit to enforce Ordinance No. 65-32 and Rule No. 4 against petitioners does arise under federal law; the court therefore remanded the Village's claims to the district court. Pet. App. 1-5. Petitioners do not challenge that ruling here. In a single sentence at the conclusion of its opinion, *id.* at 5, the court of appeals, without elaboration, affirmed the remaining portions of the district court's judgment, which included the dismissal of petitioners' counterclaims and third-party claims.[2]

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[2] The court of appeals amended its opinion on November 24, 1989, to add a paragraph stating that the Kaloas and Constantines, the Village members who leased their Family Plan units to petitioners and who are defendants in the Village's principal action, did not have standing to appeal the district court's dismissal of the Village's complaint against them. See Pet. Supp. Br. App. at 13900-13901. The Kaloas and Constantines filed a petition for a writ of certiorari seeking review of that ruling, *Kaloa* v. *Native Village of Tyonek*, No.

DISCUSSION

Petitioners seek review of the court of appeals' summary affirmance of the district court's unpublished decision dismissing their claims against the Village and the Village officers. That decision, however, is correct, does not conflict with any decision of this Court or of another court of appeals, and presents no issue warranting review by this Court.

1. Although the legal issues presented at this stage of the case concern immunity from suit, the underlying dispute centers on Village Ordinance No. 65-32. That Ordinance provides that housing constructed with the tribal trust funds that were derived from oil leases on the Moquawkie Reservation before the Reservation was revoked, may not be leased to nonmembers without the consent of the Village Council. We agree with the district court that Ordinance No. 65-32 is a valid implementation of 25 U.S.C. 398b, which provides that the proceeds of leasing of an Executive Order Reservation set aside for a "tribe of Indians" are to be devoted to the "use and benefit of such Indians." Restrictions of this sort based on tribal membership, especially when congressionally authorized and related to the use of tribal property, do not constitute prohibited discrimination on the basis of race. *Duro* v. *Reina*, 110 S. Ct. 2053, 2063 (1990); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979); *United States* v. *Antelope*, 430 U.S. 641, 646 (1977); *Fisher* v. *District Court*, 424 U.S. 382, 390-391 (1976); *Morton* v. *Mancari*, 417 U.S. 535 (1974).

Conversely, as amicus State of Alaska recognizes (Br. 6 n.6), neither court below passed upon the validity of Village Rule No. 4, because the district court understood that Rule to be at issue only in the Village's principal action against petitioners (which has been remanded to the district court for further proceedings), not in petitioners' counterclaims and third-party claims, at issue here. Accordingly, even if we assume (contrary to the inter-

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89-1358. The Court denied their petition on April 16, 1990. 110 S. Ct. 1812 (1990).

When the court of appeals amended its opinion, it also designated the opinion for publication. See 890 F.2d 1054 (19[illegible]).

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pretation apparently given to the Rule by the Village and both courts below) that Rule No. 4's reference to "white men" is not to be understood as merely a short-hand reference to nonmembers of the Village, this case does not present the primary issue petitioners seek to have resolved: whether Tyonek may "exclude Petitioners from Tyonek, Alaska, on the basis of their race" (Pet. i). For these reasons, the setting of this case would not, in our view, render it a suitable vehicle for consideration of the various issues petitioners seek to raise concerning the application of civil rights statutes to Indian Tribes—even if those issues otherwise warranted review.

Moreover, the interaction of the civil rights laws with the traditional independent and sovereign powers of Indian Tribes has been the subject of considerable review by other departments of government in recent years. The Commission on Civil Rights has undertaken a thorough study of the enforcement of the Indian Civil Rights Act (ICRA), including a series of extensive field hearings,[3] and we have been informed by the Commission that its final report on that subject is now being prepared. The Senate Select Committee on Indian Affairs conducted hearings on the same subject during the last Congress.[4] And a bill has been introduced in this Congress that would authorize suits against Indian Tribes and tribal officers for injunctive or other equitable relief (but not money damages) to secure compliance with the Indian Civil Rights Act. S. 517, 101st Cong., 1st Sess. (1989). The bill would expressly waive the sovereign immunity of Tribes to those suits, but would require exhaustion of tribal remedies before such a suit could be brought. The effect of the bill, if enacted, would be to allow (albeit under special procedures) certain of the suits that this Court held in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), are not authorized under the ICRA as it now reads.

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[3] *Hearings Before the United States Comm'n on Civil Rights Enforcement of the Indian Civil Rights Act* (1986-1988) (5 vols.).

[4] *Tribal Court Systems and Indian Civil Rights Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 1st Sess. (1988).

In these circumstances, it would, in our view, be appropriate to defer to the legislative process to resolve the difficult questions of how civil rights are best defined, enforced and remedied in this setting, rather than to grant petitoners' request for a judicial overruling of *Martinez* or dilution of settled immunity doctrines in order to achieve the same end. In this case, the lower courts' rulings on those issues are fully consistent with this Court's precedents, and present no occasion for further review.

2. The district court held, based upon "Tyonek's history and the manner in which the federal government has dealt with Tyonek," that the Village possesses sovereign immunity from suit in the same manner as other Indian Tribes. Pet. App. 24. That holding is correct, especially in the context of this case. The sovereign immunity of Indian Tribes "is a necessary corollary to Indian sovereignty and self-governance," *Three Affiliated Tribes* v. *Wold Engineering*, 476 U.S. 877, 890 (1986), and it has been repeatedly recognized by this Court. See *id.* at 890-891; *Santa Clara Pueblo*, 436 U.S. at 58-59; *Puyallup Tribe* v. *Washington Dep't of Game*, 433 U.S. 165, 172-173 (1977); *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Turner* v. *United States*, 248 U.S. 354, 358 (1919). We discuss the origins and purposes of this rule in our amicus brief (at 7-9) filed in response to the Court's invitation in *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe*, petition for cert. pending, No. 89-1322, and there is no need to repeat that discussion here. Petitioners in fact do not challenge this basic rule. Instead, they argue that it should not be applied in this case. None of the reasons they advance has merit.

a. Petitioners first contend (Pet. 13-17) that historical differences between the Nation's treatment of Alaskan Natives and its treatment of Natives in the contiguous 48 States justify a finding that Alaska Native villages like Tyonek are not entitled to immunity. While the history of federal Indian policy in Alaska is to some extent unique, the conclusion urged by petitioners does not follow. That Alaska Native Villages may be self-governing

tribes, akin to those in the continental United States,[5] has been recognized by Executive action, Legislative enactment and judicial precedent for more than one hundred years. It is important to stress, however, that this case involves only the question of the Village's sovereign immunity to suit as a procedural matter. A finding of such immunity does not resolve the distinct question of the scope of the Village's powers of self-government as a substantive matter.

Article III of the 1867 Treaty of Cession (Treaty of March 30, 1867, 15 Stat. 542) provided:

> The uncivilized tribes [of Alaska] will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

This provision was interpreted in *In re Minook*, 2 Alaska 200, 221 (D. Alaska 1904), as giving "the Indian tribes of Alaska the same status before the law as those of the United States." A 1923 opinion of the Interior Solicitor, dealing specifically with the Village of Tyonek, similarly concluded that "[t]he relations existing between [the Alaska Natives] and the Government are very similar and in many respects identical with those which have long existed between the Government and the aboriginal peoples residing within the territorial limits of the Unites States." *Leasing of*

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[5] The organization of Alaska Natives along village rather than tribal lines is not unique. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664 & n.5 (1979) (noting that some Northwest Indians entitled to treaty fishing rights had lived in "loose bands" that were organized into "tribes" by the government agents who negotiated the treaties); see also *Puget Sound Gillnetters Ass'n* v. *United States District Court*, 573 F.2d 1123, 1127 n.2 (9th Cir. 1978) (while "questionable * * * whether the collections of villages Governor Stephens made for purposes of his negotiations were in fact tribes," court treated them as sovereign entities); cf. *United States* v. *Sandoval*, 231 U.S. 28, 39 (1913) (Pueblo Indians treated like other Indian tribes, despite fact that they are "sedentary rather than nomadic" and live on lands held in communal, fee simple ownership). Thus, a village can be a tribe in the legal sense of being a self-governing Indian community. See D. Case, *Alaska Native and American Laws* 436 (1984) ("[u]nless law is simply a word game, whether a Native community exercises powers of self-government should not turn on whether it is described as a 'tribe,' a 'village' or something else").

Lands Within Reservations Created for the Benefit of the Natives of Alaska, 49 Pub. Lands Dec. 592, 593 (1923). Accord *Status of Alaskan Natives*, 53 Interior Dec. 593 (1932). And a 1932 Solicitor's Opinion concluded that marriage among Alaska Natives maintaining their tribal relations should be governed by the laws and customs of the Alaska Native tribes. *Validity of Marriage By Custom Among the Natives Or Indians of Alaska*, 54 Interior Dec. 39, 46 (1932).

The Indian Reorganization Act (IRA), 25 U.S.C. 461 *et seq.*, was amended by the Act of May 1, 1936, ch. 254, § 1, 49 Stat. 1250 (25 U.S.C. 473a), in order to permit "groups of Indians in Alaska not [heretofore] recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district" to adopt constitutions and bylaws and receive charters of incorporation under Sections 16 and 17 of the IRA, 25 U.S.C. 476, 477. Many Native Villages in Alaska, including Tyonek, took advantage of these provisions to reorganize their existing governments to carry on municipal activities and business affairs more effectively. See F. Cohen, *Handbook of Federal Indian Law* 751 (1982).

In recent enactments, Congress has again treated Alaska Native Villages such as Tyonek as self-governing tribes. For instance, under Sections 103(8), 108, and 109 of the Indian Child Welfare Act of 1978, 25 U.S.C. 1903(8), 1918, and 1919, any Alaska Native Village may obtain retrocession of jurisdiction over Indian child welfare cases and may negotiate jurisdictional arrangements with the state. Congress in 1982 made revenue sharing grants available to any "Alaskan native village that carries out substantial governmental duties and powers." 31 U.S.C. 6701(a)(5)(B) (repealed April 7, 1986, Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 14001(a)(1), 100 Stat. 327). Moreover, the Indian Civil Rights Act, which petitioners invoke (Pet. 8, 25-26), imposes restrictions only on an "Indian tribe in exercising [its] powers of self-government." 25 U.S.C. 1302. Petitioners cannot both claim the protection of that Act and deny the existence of the Village as such a Tribe.

The courts, too, have treated Alaska Natives as subject to many of the same rules that apply to Indians in the lower States. For instance, in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 285-286 (1955), this Court rejected the argument that the nature of Indian landholding in Alaska, which it described as "tribal," was significantly different from that of Tribes elsewhere in the United States. See also *Alaska Chapter, Associated Gen'l Contractors* v. *Pierce*, 694 F.2d 1162, 1169 n.10 (9th Cir. 1982) ("Alaskan Natives, including Eskimos and Aleuts, have been considered to have the same status as other federally recognized American Indians."); *Petition of McCord*, 151 F. Supp. 132, 135 (D. Alaska 1957) ("[t]he prosecution's argument that Alaska natives have a different status than Indians of the States is a rather novel concept which I regard as inaccurate"). Correspondingly, courts have recognized the applicability of the doctrine of tribal immunity to self-governing Alaska Native Villages. See *Cogo* v. *Central Council of Tlingit and Haida Indians*, 465 F. Supp. 1286 (D. Alaska 1979); *Johnson* v. *Chilkat Indian Village*, 457 F. Supp. 384, 387 (D. Alaska 1978); *Atkinson* v. *Haldane*, 569 P.2d 151 (Alaska 1977).

The Alaska Supreme Court, in a sharply divided opinion, has held that the Native Village of Stevens does not enjoy sovereign immunity. *Native Village of Stevens* v. *Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988). But as the dissent in *Stevens* correctly observed, 757 P.2d at 44, the majority placed undue emphasis on the facts that Alaska Natives do not reside on reservations and are generally subject to state law. Those factors should not preclude immunity, so long as a Native Village is in fact a self-governing body. In *Puyallup*, for example, the Tribe was held to be protected by sovereign immunity even as to matters arising off reservation. 433 U.S. at 167, 171.[6] In any event, the

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[6] See also *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913) (federal Indian liquor laws apply to Pueblo Indian communities occupying lands owned in unreserved, communal fee title); *Jones* v. *Meehan*, 175 U.S. 1, 29 (1899) (tribe retains authority over inheritance of non-reservation, non-trust property); *Three Affiliated Tribes II*, 476 U.S. at 892 (state jurisdiction over an Indian tribe is not inconsistent with tribal sovereign immunity); *U.S. Fidelity &*

majority in *Stevens* expressly recognized that the district court's decision in the instant case was distinguishable based upon what it termed the "unique" history of Tyonek, because the Village occupied a Reservation at the time it adopted a constitution and by-laws under the IRA. 757 P.2d at 35-36 n.4. That point has particular significance here, because the housing that is the subject of the suit was constructed with funds derived from the leasing of the Reservation before it was revoked. Accordingly, even if the question of the immunity of other Alaska Native Villages might at some time warrant review by this Court, the decision below presents no conflict with rulings by the Alaska courts in the circumstances of this case.

b. Petitioners next contend (Pet. 17, 25) that ANCSA and the ICRA "extinguished" or waived the Village's sovereign immunity. While Congress may waive a tribe's sovereign immunity, such a waiver "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). As the district court correctly pointed out, ANCSA "did not expressly change the status of Tyonek or its IRA Village government." Pet. App. 14. By contrast, ANCSA did explicitly extinguish aboriginal hunting, fishing and land rights. Although ANSCA's revocation of Tyonek's reservation may affect the extent of the Village's political authority over its former Reservation lands, see, *e.g.*, *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962), neither reservation status nor land ownership is an absolute prerequisite for the existence of Native self-governance—or, in particular, tribal sovereign immunity. See note 6, *supra*.[7]

Guaranty Co., 309 U.S. at 512 (immunity exists "even after dissolution of the tribal government"); *Bottomly* v. *Passamaquoddy Tribe*, 599 F.2d 1061, 1064-1066 (1st Cir. 1979); *Haile* v. *Saunooke*, 246 F.2d 293 (4th Cir. 1957).

[7] Congress amended ANCSA in 1988 to permit the shareholders of ANCSA corporations to decide whether to continue restrictions on alienation of corporation stock. Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, § 2, 101 Stat. 1788. Section 2(8) of the Amendments, 101 Stat. 1789, 43 U.S.C. 1601, states that no provision of the Act shall "confer on, or deny to, any Native organization any degree of sovereign governmental authority over lands (including management, or regulation of the taking, of fish and wildlife) or persons in Alaska." The legislative history indicates that Congress was aware of the controversy over whether there are tribal entities

Petitioners' alternative argument that the ICRA waived tribal sovereign immunity has already been rejected in *Santa Clara Pueblo*, 436 U.S. at 59, where this Court, after finding no "unequivocal expression of contrary legislative intent," concluded that "suits against the tribe under the ICRA are barred by its sovereign immunity from suit."[8] Petitioners' reliance on *Dry Creek Lodge, Inc.* v. *Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981), is misplaced. The majority opinion in *Dry Creek Lodge* found that the ICRA waived immunity in a suit against a tribe by non-Indians who had no remedy within the tribal courts. As the district court pointed out (Pet. App. 29-32), *Dry Creek Lodge* is plainly inconsistent with *Santa Clara*. Nothing in *Santa Clara* limits a tribe's sovereign immunity to suits arising from intra-tribal disputes. To the contrary, this Court supported its sovereign immunity holding in *Santa Clara* by relying on earlier decisions that did not involve intra-tribal disputes. See 436 U.S. at 58 (citing *Puyallup*, 433 U.S. at 172-173, and *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 512-513). Furthermore, *Dry Creek Lodge* rests on the spurious premise that "[t]here has to be a forum where the dispute can be settled." 623 F.2d at 685. The very purpose of sovereign immunity is to protect the sovereign against suits in *any* court, unless immunity has been waived.

The Ninth Circuit has rejected the analysis of *Dry Creek Lodge* as inconsistent with *Santa Clara Pueblo*. See *R.J. Williams Co.* v. *Fort Belknap Housing Authority*, 619 F.2d 979, 981 (1983). The importance of this circuit conflict is minimal, however, because the Tenth Circuit has studiously avoided following *Dry Creek Lodge* by giving that case an extremely narrow reading. See, *e.g.*, *Nero* v. *Cherokee Nation*, 892 F.2d 1457, 1460 (10th Cir. 1989)(*Dry Creek Lodge* exception is "narrowly construed"); *Seneca-Cayuga Tribe* v. *State ex rel. Thompson*, 874 F.2d 709,

in Alaska that can exercise governmental authority over lands or persons, and determined to leave that issue "to the courts." S. Rep. No. 201, 100th Cong., 1st Sess. 23 (1987).

[8] Petitioners do not argue that tribal sovereign immunity was waived by Congress when it enacted 42 U.S.C. 1981, 1982, 1983, or the Fair Housing Act, 42 U.S.C. 3610(d).

715 n.6 (10th Cir. 1989) ("*Dry Creek Lodge* was based on highly unusual circumstances"); *White* v. *Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984) ("*Dry Creek* opinion must be regarded as requiring narrow interpretation in order to not come into conflict with the decision of the Supreme Court in *Santa Clara*."); *Ramey Constr. Co.* v. *Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319 n.4 (10th Cir. 1982) (same).

Moreover, even if the *Dry Creek Lodge* exception could somehow be reconciled with *Santa Clara Pueblo*, petitioners could not bring themselves within it, because (1) enforcement of Ordinance 65-32's requirement—that tribal members lease their Family Plan housing units only to other tribal members—would appear to relate primarily to "internal tribal issues," *Nero*, 892 F.2d at 1460, and (2) the Village did afford petitioners a forum for relief, *id.* at 1460 n.5, since the Village Council may grant permission to lease to nonmembers and the Pucketts in fact were granted such permission. There is, accordingly, no conflict between the decision below and *Dry Creek Lodge* warranting review by this Court.[9]

c. As explained in our amicus brief in *Potawatomi*, 89-1322 U.S. Amicus Br. at 9-10, petitioners' argument that the Village waived its immunity to the counterclaims and cross-claims (Pet. 25) by filing its principal action against petitioners is wrong and was rejected in *U.S. Fidelity and Guaranty Co.*, 309 U.S. at 513.[10] Nor are petitioners correct in contending (Pet. 24) that the Village consented to this suit by adopting a corporate charter with a "sue and be sued" clause. Section 16 of the IRA authorizes tribes to organize a constitutional entity, while Section 17 authorizes

[9] In *Dry Creek Lodge* itself, the United States filed an amicus brief in this Court at the petition stage urging the Court to grant the Tribe's petition and summarily reverse the Tenth Circuit's decision because it was so clearly inconsistent with *Santa Clara Pueblo*. See 80-613 U.S. Amicus Br. at 9. The Court denied the petition, over three dissents. Because *Dry Creek Lodge* has been effectively confined to its facts by the Tenth Circuit, and because the decision below is clearly correct under *Santa Clara Pueblo*, we do not believe that the immunity issue warrants review here.

[10] As respondents properly concede (Br. in Opp. 25 n.5), petitioners' contentions regarding the invalidity of the Village ordinances can be raised as a defense to the eviction action, should the Village pursue that action on remand.

organization of a corporate entity. The courts have recognized that these two entities are distinct, and that a consent to suit clause in a corporate charter in no way waives the sovereign immunity of a tribe as a constitutional entity. *Seneca-Cayuga Tribe*, 874 F.2d at 715 n.9; *Ramey Constr.*, 673 F.2d at 320; *Kenai Oil & Gas, Inc.* v. *Department of the Interior*, 522 F. Supp. 521 (C.D. Utah 1981), aff'd and remanded, 671 F.2d 383 (10th Cir. 1982); *Gold* v. *Confederated Tribes*, 478 F. Supp. 190, 196 (D. Ore. 1979); *Atkinson* v. *Haldane*, 569 P.2d 151 (Alaska 1977); but see *Martinez* v. *Southern Ute Tribe*, 150 Colo. 504, 374 P.2d 691 (1962).

Petitioners' reliance (Pet. 24) on *Fontenelle* v. *Omaha Tribe*, 430 F.2d 143 (8th Cir. 1970), is misplaced. That decision did not consider the distinction between the tribe's constitutional entity and its corporate entity. In a later decision, the Eighth Circuit made clear that a consent to suit clause in a Section 17 corporate charter does not waive immunity for actions taken pursuant to a tribe's constitution. *American Indian Agricultural Credit Consortium* v. *Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379-1380 (8th Cir. 1985).[11]

3. Finally, petitioners briefly challenge (Pet. 27-29) the district court's holding that because their claims against the Village are barred by tribal sovereign immunity, their claims against the Village officers in their official capacities based on their enforcement of Ordinance 65-32 are barred by derivative immunity. Pet. App. 32-35.[12] Contrary to petitioners' contention, the courts below correctly disposed of this issue.

The courts have frequently described tribal sovereign immunity as "co-extensive with that of the United States." See, *e.g.*, *Kennerly* v. *United States*, 721 F.2d 1252, 1258 (9th Cir. 1983);

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[11] *Parker Drilling Co.* v. *Metlakatla Indian Community*, 451 F. Supp. 1127 (D. Alaska 1978), also cited by petitioners (Pet. 24), likewise recognizes the distinction between the entities.

[12] The portion of the petition discussing petitioners' claims against the Village officers indicates that petitioners are pursuing those claims only in the latter's official capacities, since it is devoted almost entirely to a discussion of the Village's authority to adopt the ordinance the officers enforced. See Pet. 27-29. If the Village officers were sued in their personal capacities, questions of qualified immunity would also arise.

Jicarilla Apache Tribe v. *Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982). Derivative immunity for officers acting within the scope of their duties is an essential component of sovereign immunity, because judgments against the officers may interfere with public administration or expend themselves against the public treasury. See *Dugan* v. *Rank*, 372 U.S. 609, 620-621 (1963); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-688 (1949).

The Court's statement in *Santa Clara Pueblo* that one of the officers of the Pueblo was "not protected by the Tribe's immunity from suit," 436 U.S. at 59, therefore must be understood to mean that the officer did not have the *absolute* immunity of the Tribe. This is evident from the Court's citation, *ibid.*, to *Ex parte Young*, 209 U.S. 123 (1908), which accepts the proposition that state officers have derivative immunity from suits brought against them in their official capacities, but concludes that a suit challenging the constitutionality of an officer's actions in enforcing a state law is not one against the State for purposes of the Eleventh Amendment. "The theory of *Young* was that an unconstitutional statute is void, *id.* at 159, and therefore does not 'impart to [the official] any immunity from responsibility to the Supreme authority of the United States.' " *Green* v. *Mansour*, 474 U.S. 64, 68 (1985), quoting 209 U.S. at 160. Accordingly, the lower courts have recognized that derivative tribal immunity "extends to tribal officials when acting in their official capacity and within the scope of their authority." *United States* v. *Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981); see also *Oklahoma ex rel. Oklahoma Tax Comm'n* v. *Graham*, 822 F.2d 951, 956-957 (10th Cir. 1987), rev'd on other grounds, 109 S. Ct. 1519 (1989); *Hardin* v. *White Mountain Apache Tribe*, 779 F.2d 476, 479-480 (9th Cir. 1985).

Petitioners appear to accept the proposition that tribal officers acting within the scope of their authority are generally protected by the Tribe's immunity when sued in their official capacity, but they contend (Pet. 27) that the tribal officers in this case "exceeded the permissible scope of their authority as [Village]

officers."[13] There can be no serious contention that the district court erred in finding that the four named Tyonek officers were acting within the scope of authority delegated to them by the Village when they enforced Ordinance No. 65-32. Pet. App. 33. Rather, the thrust of petitioners' argument seems to be that the Ordinance restricting Family Plan housing units to members of the Village is void because it was beyond the *Village's* authority to adopt. This claim is insubstantial.

The district court correctly pointed out (Pet. App. 34-35) that the statute that authorized the oil and gas leasing on the Reservation, the proceeds of which were used to build the Family Plan housing, clearly contemplated that the proceeds should be used to benefit "the tribe of Indians for whose benefit the reservation or withdrawal was created." 25 U.S.C. 398b. Tyonek, which was a reservation Tribe when the Ordinance was passed in 1965, clearly was authorized to take necessary measures to assure that the housing built with the lease proceeds continued to benefit tribal members. Moreover, Section 16 of the Indian Reorganization Act provides that the constitution adopted by a tribe shall vest in it the power "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe," 25 U.S.C. 476, and Article IV of the Tyonek Constitution contains such a provision. Even apart from the IRA, the power to prevent alienation of tribally-constructed housing would appear to fall squarely within the Village's "inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Montana* v. *United States*, 450 U.S. 544, 564 (1981). Ordinance No. 65-32 affects nonmembers only indirectly, to the extent that they seek to lease Family Plan units. *Montana* affirms that "[a] tribe may regulate * * * the activities of

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[13] Although petitioners assert (Pet. 27) that the Village officers exceeded their authority by excluding petitioners "because of their race," the ensuing discussion makes clear that the quoted phrase simply refers to the officers' enforcement of Ordinance No. 65-32 against them. As we have explained (see page 6, *supra*), the Ordinance restricts eligibility to lease Family Plan housing on the basis of membership in the Village, not race, and such distinctions are not prohibited racial classifications.

nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565.

Alaska's contention (Amicus Br. 5) that ANCSA terminated the Village's authority to enforce the Family Plan ordinance is without support in the language or legislative history of that statute. There is no evidence in ANCSA of a general intent to terminate Indian self-government in Alaska. Even where Congress has enacted explicit termination legislation, the courts have found that Tribes retain residual power over matters such as membership and the regulation of remaining treaty rights. See *Kimball* v. *Callahan*, 590 F.2d 768, 775-776 (9th Cir.), cert. denied, 444 U.S. 826 (1979); *Menominee Tribe* v. *United States*, 388 F.2d 998 (Ct. Cl. 1967), aff'd, 391 U.S. 404 (1968).[14]

At bottom, moreover, petitioners' objection to the district court's derivative immunity ruling rests entirely on their disagreement with that court's interpretation of 25 U.S.C. 398b to authorize the Village to adopt Ordinance No. 65-32 in order to preserve housing built with funds derived from oil leasing for the benefit of tribal members. See Pet. 28-29. In our judgment, that narrow ruling, upheld by the court of appeals, does not warrant further review.

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[14] The State of Alaska incorrectly suggests that this case presents the question whether Native Villages may exercise "reservation-like governmental authority" (Amicus Br. 9) and whether the State's jurisdiction is limited by Villages' retained powers of self-government (Amicus Br. 8). The lower courts did not reach those broader issues; they resolved only the authority of the Village to restrict the alienability of housing originally built with trust funds. Pet. App. 33-35. The court of appeals remanded the eviction action, which, if the Village continues to rely on Rule No. 4, would eventually present the broader question of whether the "traditional and undisputed power [of tribes] to exclude persons whom they deem to be undesirable from tribal lands," *Duro* v. *Reina*, 110 S. Ct. at 2065, survives where the lands in question are no longer part of a reservation but have been transferred in fee to a for-profit corporation pursuant to ANCSA. Cf. *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962). That question is not, however, involved here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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